PUBLIC PROSECUTOR

v.

ABDULLAH HJ. YAKUB

HIGH COURT, BRUNEI
DENYS ROBERTS CJ
[CRIMINAL TRIAL NO. 13 OF 1991]
9 FEBRUARY 1991

CRIMINAL PROCEDURE: *Rape - Aggravated rape - Victim under 14 years - Unlawful carnal knowledge of woman under 16 years - Consent - Defence of belief that woman consented - Applicability of Morgan's case - Penal Code, ss. 376(1), (2) - Unlawful Carnal Knowledge Act, ss. 2, 3*

The defendant A is charged with having committed the following offences against X:

(a) Section 376(1) Penal Code - rape of a woman under 14 years.

(b) Section 376(2) Penal Code - rape of a woman under 14 years without her consent and

(c) Section 2 Unlawful Carnal Knowledge Act - Carnal knowledge of a person under the age of 16 years.

D and his friends picked-up X in a car one evening - D said that he believed X was above 16 years of age; he said that when he asked her age, she did not reply. X said she told him her true age was 12 years. Later, after making two stops and a detour to his house, X followed D to his room in the camp.

Neither party disputed that sexual intercourse had taken place on 2 occasions that evening. D denied however that he used any force on her; he alleged that X was co-operative and did not make any effort to get away or draw attention to her plight even though she had ample opportunity to do so. The doctor who examined X was of the opinion that sexual intercourse was not forceful.

The issues for the Court were the consent of X and the defendant's belief as to X's age when intercourse took place.

Offences (a) and (b) are based on X being under 14 years at the time of the offences and offence (c) is based on X being under 16 years old. For the latter, under s. 3 of the Unlawful Carnal Knowledge Act, a special defence is provided for D if he can establish that he had reasonable cause to believe that the girl was above the age of 16 years.

Held:

[1] In Brunei, complaints which are made by a victim in a sexual case can amount to corroboration as to consistency of her consent; this principle was also applicable in relation to unlawful carnal knowledge.

[2] *Section 376(1) Penal Code*

The Court did not accept D's story as to the fact that D was concerned what X's real age was; the Court believed X who said that when asked her age in the car, she told D she was 12.

[3] *Force under s. 376(2) Penal Code*

(a) The medical examination did not reveal marks of injury on X's body; the Court is satisfied that, at this stage if not well before, she had already decided to have intercourse with A and that she was not put in any fear of hurt or death by him;

(b) as such the Court held that no hurt was caused to X. Therefore, the element of fear of hurt or death and the application of force under s. 376(2) was not proven.

[4] *Consent under s. 376(2) Penal Code*

(a) It was a sufficient defence to rape for a defendant to show that he had a belief that the woman had consented, even if this belief was not based on reasonable grounds (*DPP v. Morgan* applied);

(b) although it is a defence to hold a belief in consent on reasonable grounds, it is less likely that a Court will find that such belief was held if there are not reasonable grounds for that belief;

(c) on the evidence, the Court held that X did consent to sexual intercourse on both occasions with D - therefore it was not necessary to consider the effect of *Morgan's* case;

(d) if it were necessary for the Court to do so, the Court would have no hesitation in deciding that D had reasonable grounds for believing that X had consented.

[5] *Section 2 Unlawful Carnal Knowledge Act*

In relation to the carnal knowledge offence, D had not proved, on a balance of probabilities, that he had reasonable cause to believe that X was of or above the age of 16 years; for this offence, consent is not relevant.

[D convicted of rape under s. 376(1) Penal Code and s. 2 Unlawful Carnal Knowledge Act; acquitted under s. 376(2) Penal Code.]

Cases referred to:
DPP v. Morgan [1976] AC 182
PP v. Abidin and Ors. [1987] 2 MLJ 741

Legislation referred to:
Penal Code [Brunei], ss. 375, 376(1), (2)
Unlawful Carnal Knowledge Act [Brunei], ss. 2, 3

For the public prosecutor - Naemah Md. Ali; A.G's Chambers
For the defendant - Christopher Sawan; Ismail Duad, Barry Sigar & Co.

JUDGMENT

Denys Roberts CJ:

The defendant, Abdullah bin Haji Yakub faces three charges in the following terms:

1st charge:

That you on the night of 7 December 1989, in Room No. 13, Sergeant's Mess at Penanjong Camp in Tutong, Negara Brunei Darusalam, committed rape on X, a woman under 14 years of age, without her consent, and thereby committed an offence punishable under s. 376(2) the Penal Code.

2nd charge:

That you on the night of the 7 December 1989 in Room No. 13, Sergeant's Mess at Penanjong Camp in Tutong, Negara Brunei Darussalam, committed rape on X a woman under 14 years of age, and thereby committed an offence punishable under s. 376(1) of the Penal Code.

3rd charge:

That you on the night of 7 December 1989 in Room No. 13, Sergeant's Mess at Penanjong Camp in Tutong, Negara Brunei Darussalam, did have carnal knowledge of a girl namely, X, under the age of 16 years, and thereby you have committed an offence punishable under s. 2 of the Unlawful Carnal Knowledge Act, Cap. 29.

The defendant pleaded not guilty before me to all three charges.

I remind myself that in a criminal prosecution the burden lies on the prosecution to establish, so that I am sure, every element of each charge beyond a reasonable doubt. This burden lies on the prosecution throughout the trial and does not change, with the exception of the special defence that is provided for the defendant under s. 3 of the Unlawful Carnal Knowledge Act. Under this section, the burden lies on the defendant to establish, on the balance of the probabilities, which is a lesser burden than that which lies on the prosecution, that the accused had reasonable cause to believe that the girl was over 16 years of age.

I also note that a conviction on one of the charges does not mean that I must reach the same conclusion on all of them. It is necessary to consider separately the evidence on each charge to see if the prosecution has established all the elements of each offence.

Section 375 of the Penal Code defines rape as being committed when a man has sexual intercourse with a woman in the circumstances falling within any of the five description which are set out in the section. These include intercourse:

(a) against her will;

(b) without her consent;

(c) with her consent when this is obtained by putting her in fear of death or hurt; or

(e) with or without her consent, when she is under 14 years of age.

I remind myself of a number of propositions of law, which apply to the various issues which arise in the course of this trial.

Firstly, in a charge of rape or attempted rape, some corroboration of the evidence of the complainant is usually required. Secondly, having warned myself that it is dangerous to act on the evidence of the complainant alone, I may act on her evidence by itself if I find it so credible that I am sure of the guilt of the defendant and I am prepared to act upon the complainant's evidence.

Thirdly, complaints which are made by a victim in a sexual case, although they do not amount in English Law to corroboration of her evidence but only as to consistency of her conduct, can in Brunei amount to such corroboration. I shall apply the same principles to the charge of unlawful carnal knowledge. In relation to a woman, carnal knowledge includes sexual intercourse, though it is wider than that.

Section 375 of the Penal Code sets out the acts which can constitute rape. It is sufficient to constitute rape, according to the explanation which is attached to that section, if there has been a penetration of the woman.

This will mean that if there is a penetration of the vagina by the male organ, the offence is complete, whether or not this is followed by ejaculation inside or outside the woman.

It is not necessary for me to recite in any great detail at this stage the facts of the case. It is I think, sufficient to say that, at about 5.30 p.m., on the evening of 7 December 1989, the victim, whom I will call Miss X, was dropped at Seria town by her step mother, with whom she had been living for several years.

At a road junction there, she was accosted by the defendant and two of his friends, all of whom had came from Penanjong Camp into Seria in a car borrowed from a friend of the defendant.

Although Miss. X had never met or seen any of the men in the car before, after a short conversation she got inside it sitting on the seat at the back with the defendant. After two stops, near Kingsway Club and at the Penaga Club, she was taken to Penanjong Camp. Here she went with the defendant to his car which was parked at the camp. After he made a long detour to his house, in order that he could collect clothing, she went with him to his room in the camp.

On the evening of 7 December 1989, she had sexual intercourse with the defendant on two occasions in the latter's room. After she had shared a bed with him for most of the night, he took her back, accompanied by a friend, to the house of her real mother at Lorong 3, near Seria. She did not return to her step mother's house, but to the house of her natural mother nearby.

Although she was asked by her natural mother, on at least three occasions, during the day and evening of 8 December, where she had been, she only said that she had been on an outing.

It was not until the following morning, under pressure from her relatives, that she told the story which she repeated in the witness box during the course of the trial.

Sexual Intercourse

The defendant, Abdullah bin Hj. Yakub, does not dispute that he had sexual intercourse with Miss. X in his room on the evening of 7 December 1989.

To use his own words:

> I had sexual intercourse with her. She was very cooperative. When I was about to start she helped me by putting my penis into her vagina. I had no difficulty in penetrating her private parts. I did not use any lotion as it was easy to penetrate.

He continued:

> she did not protest at any time. I had sexual intercourse with her twice that night. She was cooperative the second time as well.

Later on said:

> I admit that I had sexual intercourse with her a couple of times.

He added, though somewhat unattractively, that Miss. X behaved in his room like a prostitute and that she 'gave him good service'.

Miss. X had no doubt that sexual intercourse had taken place between her and Abdullah.

As she said herself:

> I thought he wanted to rape me. Then I agreed, I was scared as I though he might kill me or beat me. That is why I agreed. He took off all my clothes and he was on top of me and put his private parts into mine. I felt some pain.

Later on she said:

> I felt some pain in my private parts, and I felt that they were wet.

This seems to be consistent with the doctor's examination of Miss. X, as a result of which the doctor stated her opinion that, if sexual intercourse had taken place within the previous 48 hours and it probably had done so, that sexual intercourse was not forceful. She added that if ejaculation had taken place, it was probably outside the vagina. If ejaculation had taken place inside the vagina, she would have expected the level of acid phosphat there to be higher than it was found to be. She was later given to understand that this level, as a result of the swabs which she had taken, was within normal limits.

She added that the girl's hymen had been ruptured on some previous occasion, possibly by intercourse or by insertion of some other instrument and that one of her own fingers could easily be admitted to the girl's vagina.

This greatly narrows the issues which remain. These are mainly that of the consent of the girl and of what the defendant believed her age to be at the time when intercourse took place.

Section 376

There are two separate offences of rape under s. 376 of the Penal Code, a general offence under s. 376(1) and what I will call aggravated rape under s. 376(2). In accordance with the definition in para. (e) of s. 375 of the Penal Code, rape is committed on a girl under the age 14 with or without her consent. The prosecution, to establish that form of rape, need therefore only prove that sexual intercourse occurred and that the girl was under 14 years at the time. Whether or not consent was given is irrelevant in deciding whether or not rape has taken place, in relation to a girl under 14, though this may, of course, be relevant to sentence and to aggravated rape under s. 376(2).

It is not disputed by the defendant and Miss. X that sexual intercourse did take place between them and this I accept. Nor has it been challenged that Miss. X herself was born on 8 October 1977, a date which she gave herself. Her mother could not remember the exact date of her daughter's birth, but says that it took place in 1977. I accept the girl's evidence on this.

The charges of rape, which the defendant faces, are based on the age of Miss. X being under 14 years of age at the time when the offences occurred.

In relation to the third charge of unlawful carnal knowledge of a girl under 16 years old, the Act provides a special defence in s. 3. The defendant has the opportunity to establish that he had reasonable cause to believe that the girl was above the age 16 years. This defence is not made available where age becomes a factor in rape, as it does in para. (e) of the definition of rape in s. 375.

Age of Miss. X

The evidence of Miss. X is that the defendant did ask her how old she was in the car on the way to Tutong. She says that she told him that she was 12.

Dr. Issac, while obviously reluctant to commit herself, since it is 15 months since she examined the girl, thinks that Miss. X could have been 'over 13' at that time.

Saharuddin, who was driving the car that evening, thought when he saw the girl that she was about 15 or 16 years old. He admitted that he did not think about her age when he first saw her at the junction. He does not say that he asked her.

Raffi, the passenger in the front, thought from the way the girl dressed and her general appearance, that she was 15 or 16. He also agreed that, when he first saw her, he did not think about her age. He never asked her what this was.

The defendant tells a different story. He says:

> we saw a girl, who looked from her body and style to be of the age of above 16.

In the car, going towards Kuala Belait from the road junction in Seria, he says that he asked Miss. X her name, her age, her school and the place where she lived. According to him she did not reply. He went on to say:

> when I first saw the girl I thought she must have been above 16 at the time, I thought of that from the beginning. I did not say anything to anyone in the car about it. I do think about her age whenever I see a girl because it is important. It would be an offence to have sex with a girl under age.

He says that he asked Miss. X for her age several times, but that there was no answer to his questions.

I do not accept the story told by the defendant in this respect. I do not believe that he was in the least concerned as to what her real age was. On his own testimony, it was important to find out what her real age was, since he knew that it would be an offence to have sexual intercourse with a girl under a certain age.

If it had been a matter of real anxiety to him, he would have pursued the matter until he got an answer. This he did not do.

The defendant agreed that he and others went to Seria that evening to look for girls. This is quite understandable. There they had found one who seemed to be willing to come with them. I think that his assessment of her age has taken place since that evening, and that at the time he was not interested in how old she was but only in whether or not she was willing.

The girl herself says that she gave her true age, when asked how old she was in the car on the way to Tutong. I think that this is what she did. The defendant, however, chose not to believe her, no doubt having already decided that when they got to his room she would do whatever he suggested.

As I already indicated, the burden lies on the defence to satisfy me under s. 3 of Cap. 29 that the defendant had reasonable cause to believe that the girl was of or above the age of 16 years, on a balance of probabilities. I do not consider that the defence provided by s. 3 of Cap. 29 has been proved by the defence.

Nor, for the purposes of completeness, has it been suggested that there is no offence under s. 2 of that Act because Miss. X was married to the defendant. It is not relevant as to whether or not consent was given by the girl to an act of sexual intercourse on a charge under the Unlawful Carnal Knowledge Act.

Force Under Section 376(2)

Section 376(2) of the Penal Code, which prescribes minimum sentences in cases of aggravated rape, applies only in certain circumstances. In deciding whether an offence falls within this sub-section, the question of consent, and whether this is actual consent or a reasonable belief in consent, becomes important, as does fear of hurt or death and the application of force.

Section 376(2) of the Penal code applies if the prosecution establishes that, in order to commit or facilitate rape, there is voluntary hurt caused to the victim or another, or the victim is put in fear of death or hurt to herself or another.

Dr. Issac, when she examined Miss. X less than 48 hours afterwards, found no marks of injury on the girl's body.

I accept that no hurt was caused to Miss. X, although she says that she only agreed to intercourse because she was frightened that Abdullah might kill or hurt her. He denies having used any force, or having held her hands, and says that, before the first act, he asked her if she had any objection.

Miss. X admits that she was asked but says that she told him she did object. He says that she said she did not. I accept his version. I am satisfied that, at this stage if not well before, she had already decided to have intercourse with Abdullah that she was not put in any fear of hurt or death by him.

Consent under s. 376(2)

I have next to consider whether the defendant had sexual intercourse with Miss. X (which he does not dispute) without her consent (which he does) since s. 376(2) applies, among other circumstances, if intercourse takes place with a girl under 14 without her consent.

I have been referred to the House of Lords decision in *DPP v. Morgan* [1976] AC 182 and to my own decision in *PP v. Abidin and Ors.* [1987] 2 MLJ 741. In the latter case, I expressed the opinion that *Morgan* does apply in Brunei. In *Augustine Foong Boo Jang v. PP* (Criminal appeal 8 of 1989) the Court of Appeal for Brunei declined to say if *Morgan* does so apply, contending itself with commenting that:

> assuming but without deciding that the principle of *Morgan* applies in Brunei, it is apparent to us that this case is of no assistance to this applicant.

As the Court of Appeal observed in that case, it is often on the facts difficult to draw any distinction between the fact of consent and reasonable belief in consent. If it is shown that a complainant in fact consented, it is unnecessary to consider reasonable belief. It is only if the Court finds that consent was not in fact given that reasonable belief that it becomes relevant.

Morgan decided that it was sufficient defence to rape for a defendant to show that he had a belief that the woman had consented, even if this belief was not based on reasonable grounds.

This decision, which sets out the common law, was based on the wording of the Sexual Offences Act 1956, and was overruled in part by the Sexual Offence (Amendment) Act 1975.

Nevertheless, I have come to the conclusion that it is in force in Brunei, since otherwise rape, as defined in s. 375 of the Penal Code, will be committed, however reasonable the belief of the defendant may be.

I will thus continue to apply *Morgan*, in appropriate cases, as part of the law of Brunei, if it becomes relevant to determine whether or not the defendant believed that consent was given, until the Court of Appeal decides that it is not.

Although it is a defence to hold a belief in consent on reasonable grounds, it is less likely that a Court will find that such belief was held if there are not reasonable grounds for that belief.

In this instance, however, there is a specific provision, in para. (e) of the definition of rape, which makes it rape to have sexual intercourse with a girl under the age of 14 with or without her consent.

Therefore the belief of the defendant that she might be over the age of 14, or that she had given her consent is of no account in deciding whether or not the defendant committed an offence against a girl under s. 376(1).

Consent is of importance to him in relation to aggravated rape under s. 376(2) of the Penal Code, which will not apply if he has had sexual intercourse with the consent of a girl under 14.

I have to determine, for the purposes of s. 376(2) whether or not Miss. X consented to the acts of intercourse and whether Abdullah, if she did not, believed that she had consented, whether or not that belief was based on reasonable grounds.

Did Miss. X Consent?

To decide whether Miss. X gave her consent, it is necessary to examine briefly her conduct, both before and after the incident took place.

She willingly entered a car in Seria town in early evening, after she had been taken there by her step mother, with instructions to walk home. She had never met or seen any of these men before. On her evidence, when she entered the car she asked to be taken home. She asked the same question on other occasions, but she never did more than ask.

The car stopped both at Kingsway and at the Penaga Club for 10 to 15 minutes each time. On both occasions, Miss. X was left alone in the back seat with the defendant. Each time he kissed her and fondled her breasts. It must have been obvious to the girl as to what was likely to happen to her if she remained in the car.

She made no effort to get out of the car or to draw attention to her plight, or to shout for help, as she could have done if she had been seriously worried.

On the way to the Penanjong Camp she drank from a can of beer, though I do not believe either that she was forced to drink from it or that she had become more than little sleepy, as she agreed that she had not drunk more than about a quarter of a tin.

When the car arrived at the camp, she made no attempt to call for help. I accept the evidence of Raffi and Saharuddin that she went to the defendant's car without protest though Raffi had tried to kiss her in the car and she must have known what was likely to happen, even though she pushed Raffi away.

All these facts must have suggested to the defendant that this was an easy girl, as he described her, who was willing to do whatever he wanted when they got to his room. Before he took her into his room, however, he visited his house, which was about 7 to 10 miles away from the camp. There he collected some clothing, leaving the girl alone in the car for a few minutes. She made no effort to get away from him then or to look for help.

At the mess in Tutong, she went willingly to his room on the first floor, in a building which contains a number of other rooms. She did not try to run away or to shout for help.

In these circumstances, what was the defendant to think? I have no doubt that he was quite sure in his own mind that Miss. X was willing to have sex with him in his room. As he said himself, if she had not been willing, why did she go to his room without any apparent protest?

He said that before the first act of intercourse he asked her if she objected to it. He says that she did not object. According to her, she said that she was not willing. I do not accept her story in this respect.

I think that she had decided to have sex with Abdullah well before the act took place in his room. I do not believe that her hands were held when this took place. I do not believe that she was put in fear of hurt or death by the defendant at the time.

I find that Miss. X did consent to sexual intercourse on both occasions with Abdullah. It is not therefore necessary for me to consider the effect of *Morgan's* case. If it were necessary for me to do so, I would have no hesitation in deciding that he had reasonable grounds for believing that she had consented.

Nor indeed was Miss. X's subsequent conduct that of the person who had been raped against her will.

She stayed the night with Abdullah on a single bed in his room. She made no effort to scream or shout or scratch or draw attention to herself. She made no complaint in the morning to Abdullah's friend, when the defendant brought him into the room, or when the friend accompanied them both in the car to her mother's house.

When they got to the village, she did not return to the house in which she been living for several years, but to the house of her mother which was nearby, although her father had specifically forbidden her to visit it. She did not return to her proper home because she was frightened that she would scolded for being out all night. She did not tell her real mother what had taken place, but only that she had been on an outing. She did not tell her what really happened that morning, or in the afternoon or in the evening, not even when she observed the defendant in a car from a window in the house.

Only the next day, that is to say 9 December, about 36 hours after the incident, did she admit to a meeting of her relatives, what had happened to her on the evening of 7 December at Tutong Camp. This was done, according to her and her mother, as a result of 'gentle persuasion'. I think it is more likely to have been a result of determined questioning by her family as to what she had done while she was away for the night.

I believe that she then told an untrue version of what had taken place, feeling that she had to account, in a defensible manner, for her absence at the age of 12 overnight from the home of her step mother.

The doctor said that if sexual intercourse had taken place within the two days before she examined Miss X it had not been forcible. I think it was more than that. I think that the sexual intercourse that took place was with the consent of Miss X, young though she was at the time.

The defendant is entitled to be acquitted of the charge of aggravated rape under s. 376(2) of the Penal Code. This depends upon intercourse in the limited circumstances set out in that subsection, none of each apply here.

I convict him of rape under s. 376(1), because the offence of rape is committed if the girl is under 14, whether or not she consents.

For the reasons which I have already indicated, I convict the defendant of the third charge brought against him, under s. 2 of the Unlawful Carnal Knowledge Act.

Sentence

The penalties for rape have been set out in the Penal Code (Amendment) Order 1988. Section 376 prescribes no minimum sentence for a conviction under subs. (1) of which you have been committed, although it does for offences under s. 376(2), of which you had been acquitted.

Some indication of the seriousness with which rape is viewed, can be seen from the fact that the maximum sentence is 30 years and whipping. Past cases of rape suggest that, when sub-section (1) applies, something between 5 and 8 years is normally given, at the end of a trial following a plea of not guilty.

A minimum sentence, however, is provided for an offence against the Unlawful Carnal Knowledge Act of not less than 2 years imprisonment and whipping.

In the case of a girl under 14, her consent is not relevant. There is an attempt, by virtue of the definition in s. 375, to protect girls of that age against themselves, as well as against men taking advantage of them.

If you had intercourse with somebody without being certain of her age, you must necessarily be taking a great risk. It is a risk which you ignored, because you had decided that the girl was an easy prey.

I take into account the fact that the girl did consent to what was done to her, that you are the sole supporter of your aged parents and that as the result of this conviction you will necessarily lose a steady and lucrative job.

I also have regard to the fact that it is 15 months since the incident. In the absence of any satisfactory explanation as to why it has taken so long, this is a factor in your favour, as although you were on bail for most of the period, the serious offences which you faced must necessarily have caused you much anxiety. I gave credit for the fact that you had been in custody for a month or more and, perhaps most important of all, that you had no previous convictions.

I cannot, in relation to the offence under the Unlawful Carnal Knowledge Act, impose the minimum sentence, which should be reserved for persons who plead guilty and who can show that there are other factors in their favour, including perhaps the proximity of the girl to the age of 16.

On the charge of rape contained in charge 2, the sentence is 14 years imprisonment and 6 strokes. On charge 3, for the conviction under Cap. 29, the sentence is 3 years imprisonment and 6 strokes. The sentence of imprisonment should run from today and will be concurrent, so that you will serve 14 years in all. The sentences of whipping will be consecutive, so that you will receive 12 strokes in all.

Also found at [1991] 2 CLJ 1428